

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

COWLITZ COUNTY, a political subdivision of
the State of Washington,

Respondent,

v.

L. CARLYLE MARTIN and LINDA C.
MARTIN, husband and wife; LAWRENCE
OLSTAD and ROBERTA KELLY, husband
and wife; WASHINGTON MUTUAL BANK;
and U.S. BANK NATIONAL ASSOCIATION
ND

Appellants.

No. 34943-4-II

PUBLISHED OPINION

PENoyer, J. — Cowlitz County filed a petition for condemnation to acquire an expanded easement over the Martins’¹ property in order to replace the existing culvert at Baxter Creek Road and Coyote Lane. The trial court granted the petition, and the Martins appealed. Because the petition for condemnation contained no lawful basis, we reverse the trial court’s order granting the petition.

¹ We use “Martins” to refer to all appellants in this matter. We mean no disrespect.

FACTS

Sometime in early 2002, Cowlitz County decided to replace a culvert located where Coyote Lane crossed Baxter Creek Road.² The County applied for a grant of approximately \$447,000 from the Salmon Recovery Fund³ for this project. The Salmon Recovery Funding Board approved the grant in April 2002. County engineering manager Ryan Lopossa explained that the County wished to replace the Baxter Creek culvert solely because it posed an impediment to fish passage.

At the time of the grant, the County held an easement over this property for the existing culvert, but the replacement culvert required a larger easement. Beginning in April 2005, the County began making offers to enlarge its existing easement through voluntary purchase and sale, but the parties did not reach an agreement.

On October 18, 2005, the Cowlitz County Board of Commissioners passed Resolution No. 05 152 authorizing the County prosecuting attorney to file a petition for condemnation of the larger easement. The resolution stated that “the Baxter Creek Culvert Replacement Project is necessary to remove and replace the existing culvert that has been identified as a barrier to fish passage and the Salmon Recovery Funding Board has awarded a grant for the project.” Clerk’s Papers (CP) at 32. The resolution also stated, “the Board finds that the property rights to be acquired are necessary to accommodate replacement of the Baxter Creek Culvert and reconstruction of Coyote Lane and constitute a public use of such property.” CP at 32. Shortly

² The existing culvert consisted of a round corrugated steel cylinder. The proposed replacement would be a three-sided concrete box, allowing the streambed to remain in its natural state.

³ See RCW 77.85.170.

thereafter, the County filed the petition for condemnation with the Cowlitz County Superior Court.

The petition seeking condemnation filed by the County's chief civil deputy prosecuting attorney alleged an additional reason for condemnation. The petition stated that condemnation was necessary to replace the existing Baxter Creek culvert because (1) "[t]he existing culvert acts as a barrier to fish passage," and (2) the existing culvert "*is not adequate to handle stream flows under a 100-year design storm.*" CP at 1 (emphasis added). This was the first mention of the County's need to replace the culvert to handle storm stream flows.

In response to the County's petition, the Martins filed a motion to dismiss. The Martins' motion to dismiss argued, in part, that the trial court lacked subject matter jurisdiction to condemn the property because (1) the County Board of Commissioners acted without authority when it condemned the Martins' property for salmon passage, (2) the Salmon Recovery Act does not authorize counties to condemn private property, and (3) salmon passage does not constitute a "public use" under RCW 8.08.010.

The trial court held an evidentiary hearing on May 19, 2006, and ruled in favor of the County, denying the Martins' motion to dismiss and granting the County's petition. The trial court found that (1) the replacement of the Baxter Creek culvert would promote fish passage and accommodate 100-year storm water flows, (2) these two uses constitute "public uses," and (3) to accomplish these two purposes, it was necessary that the County acquire the sought-after easement rights. The Martins now appeal.

ANALYSIS

I. Standard of Review

Jurisdiction is a question of law and therefore we review de novo. *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

II. Washington Counties' Authority to Condemn Private Property

The power of eminent domain is an inherent power of the state. *State v. King County*, 74 Wn.2d 673, 675, 446 P.2d 193 (1968) (citing *Miller v. City of Tacoma*, 61 Wn.2d 374, 378 P.2d 464 (1963)). This power is limited by our state constitution and must be exercised under lawful procedures. *See King County*, 74 Wn.2d at 675. Delegation of the State's sovereign power of eminent domain to the State's political subdivisions must be expressly given or necessarily implied, and statutes conferring such power must be strictly construed. *State ex rel. King County v. Superior Court for King County*, 33 Wn.2d 76, 81-82, 204 P.2d 514 (1949); *see, e.g., City of Des Moines v. Hemenway*, 73 Wn.2d 130, 137, 437 P.2d 171 (1968);

We must determine whether there was a lawful basis for the order of condemnation. The parties' arguments on this question are simple. The Martins assert that the County condemned their property without authority because the condemnation was to enable salmon passage in the Baxter Creek, and the legislature has not explicitly granted counties the authority to condemn private property for this purpose under the Salmon Recovery Act, nor does such a purpose qualify as a "public use" under RCW 8.08.010. In response, the County asserts that it has authority under the Salmon Recovery Act and other statutes to condemn the easement. Specifically, the County points out that in its petition for condemnation, it purported that the condemnation was necessary to prevent road damage and public danger in the event of a 100-year storm. However, the record does not reflect that the

Commissioners considered or were even aware of this issue when they made their finding that condemnation was necessary. The justification was first advanced by the County's attorney when he filed the condemnation petition.

We face three questions of first impression: (1) whether the Salmon Recovery Act authorizes the State or its entities to condemn private property; (2) whether rehabilitation of salmon streams constitutes a "public use" under RCW 8.08.010; and (3) whether a county's deputy prosecuting attorney has the authority to articulate an additional purpose for condemnation not articulated by the Board of Commissioners in their resolution.

A. The Salmon Recovery Act

In 1999, the Washington State Legislature enacted the Salmon Recovery Act in an attempt to improve salmonid fish runs throughout the state. RCW 77.85.005. The Legislature found that efforts to repair and improve salmonid fish runs should be based on "a strong locally based effort" and that "the state may best accomplish this objective by integrating local and regional recovery activities." RCW 77.85.005. Under the Salmon Recovery Act, counties, cities, and tribal governments seeking state funds to repair and improve salmonid fish runs must designate the repair or improvement in a "habitat project list." RCW 77.85.050. Scientific analysis must support all projects on the habitat project list. RCW 77.85.060. Once the project is placed on the habitat project list, the county, city or tribal government may apply for state funding of the project to the Salmon Recovery Funding Board. RCW 77.85.140, .170. Although any project may be placed on the habitat project list, "[n]o project included on a habitat project list shall be considered mandatory in nature and no private landowner may be forced or coerced into participation in any respect." RCW 77.85.050(1)(a).

Statutes authorizing a county, city or

municipality to exercise eminent domain must be clear and strictly construed. *E.g., Hemenway*, 73 Wn.2d at 137. We find nothing in the Salmon Recovery Act granting a county, city or tribal government authority to condemn private property. In fact, we find significant indication to the contrary. There are several instances where the Act states that any habitat project that occurs on private property requires the express consent of all of the affected property owners. RCW 77.85.010(3), .050(1)(a), .060(2)(b). Clearly, the Legislature did not intend to grant any eminent domain authority by passage of the Salmon Recovery Act. Thus, Washington counties, cities, and tribal governments have no authority to condemn private property under the Salmon Recovery Act.⁴

B. RCW 8.08.010

We now ask whether repairing and improving salmonid fish runs supports condemnation under chapter 8.08 RCW which confers the power of eminent domain to Washington counties when the condemnation is necessary for a “public use”. RCW 8.08.010.⁵

⁴ At oral argument, the County cited the additional authority of RCW 36.82.070, which states the purposes monies paid to a county road fund may be used for. This statute allows any money paid to any county road fund to be used for any county road purposes, including “the removal of barriers to fish passage related to county roads.” RCW 36.82.070. We fail to see how this citation is helpful. Chapter 36.82 RCW explains how a county creates, funds, and expends county road funds. Nothing in the title authorizes a county to condemn private property.

⁵ Every county is hereby authorized . . . whenever the board of county commissioners deems it necessary for county purposes to acquire such land, . . . and is unable to agree with the owner or owners thereof for its purchase, it shall be the duty of the prosecuting attorney to present to the superior court of the county . . . a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same . . . the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made.

A condemnation action under chapter 8.08 RCW begins with a petition for condemnation filed with the county superior court. RCW 8.08.010. The trial court must hold a hearing and issue an order either granting or denying the petition. RCW 8.08.040.

In adjudicating public use and necessity, the trial court must examine whether: (1) the use in question is really a public use; (2) the public interest requires the public use; and (3) the property to be acquired is necessary to facilitate the public use. *Hemenway*, 73 Wn.2d at 138-39; *State v. Dawes*, 66 Wn.2d 578, 404 P.2d 20 (1965); *State ex rel. Sternoff v. Superior Court of King County*, 52 Wn.2d 282, 325 P.2d 300 (1958).⁶

Whether the use contemplated constitutes a “public use” is solely a judicial question. *King County v. Farr*, 7 Wn. App. 600, 603, 501 P.2d 612 (1972) (quoting *State v. Bank of California*, 5 Wn. App. 861, 864, 491 P.2d 697 (1971)). The burden of proof is on the condemnor. *Yakima County v. Evans*, 135 Wn. App. 212, 218, 143 P.3d 891 (2006) (citing *State ex rel. Wash. State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 817, 966 P.2d 1252 (1998)).

Here, the trial court found that “fish passage” constitutes a public use. CP at 51. We must ask if substantial evidence supports finding this finding. *City of Blaine v. Feldstein*, 129 Wn. App. 73, 79, 117 P.3d 1169 (2005).

It is well settled that the taking of private property for the establishment of a highway constitutes a public use. *See Dawes*, 66 Wn.2d at 583-84. A seminal case is *State ex rel. Schroeder v. Superior Court of Adams County*, 29 Wash. 1, 69 P. 366 (1902). In holding that

RCW 8.08.010.

⁶ Although they do overlap to some extent, a determination of “public use” is not precisely the same as a determination of “public necessity.” *King County v. Thielman*, 59 Wn.2d 586, 593-94, 369 P.2d 503 (1962).

acquisition of property for roadways constitutes a public use, the Court considered (1) whether the Legislature conferred authority on a state entity to declare a taking for public use, and (2) if not, whether such a taking was considered a public need by the people at the time our constitution was framed. *State ex rel. Schroeder*, 29 Wash. at 4-5. We follow this reasoning.

RCW 8.08.020 states that any condemnation under this title shall be deemed a public use “when it is directly or indirectly, approximately or remotely for the general benefit or welfare of the county or inhabitants thereof.”⁷ Courts generally give preference to a more specific and more recent statute that addresses the same issue as an older, broader statute. *See, e.g., Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000). The Salmon Recovery Act directly addresses the public’s need concerning salmonid fish passage restoration and protection. In doing so, our Legislature clearly elected not to grant eminent domain power to protect this public interest. Because we are bound to uphold the more specific statute over the broader one, we must adhere to the authority granted in the Salmon Recovery Act rather than the broader RCW 8.08.020. Therefore, a county is bound by the provisions of the Salmon Recovery Act when seeking to protect salmonid fish passage and may not proceed under RCW 8.08.020.

Furthermore, nothing in the record suggests that the people of Washington considered acquisition of private property for fish passage a public need at the time our constitution was ratified and thus there is no constitutional basis for this condemnation. In sum, there is neither statutory nor constitutional authority for the trial court’s finding that “fish passage” constitutes a

⁷ “The people of the state of Washington declare that conservation, enhancement, and proper utilization of the state’s natural resources, including but not limited to lands, waters, timber, fish, and game are responsibilities of the state of Washington and shall remain within the express domain of the state of Washington.” RCW 77.110.030.

public use.

C. Prosecuting Attorney's Authority to Articulate New Purpose

Counties have clear statutory authority to condemn property for roadways and for storm water control facilities. *E.g.*, *In re the Matter of the Seattle Monorail Auth.*, 155 Wn.2d 612, 630, 121 P.3d 116 (2005); *Dawes*, 66 Wn.2d at 583; *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 149-50, 18 P.3d 540 (2001). The Martins argue that the Board of Commissioners did not act to exercise this general authority and acted only to protect salmonid fish runs. They point out that the Board of Commissioners' resolution mentions only salmon runs and contend that allowing the deputy prosecuting attorney to allege other reasons for the condemnation in the action filed in the trial court is an unlawful delegation of the power of condemnation.

"[T]he necessity and expedience of exercising the power of eminent domain are to be decided by the grantee of the power." *Farr*, 7 Wn. App. at 606. RCW 8.08.010 grants power of eminent domain to counties, who in turn, exercise this authority through their respective Board of Commissioners. RCW 36.32.120. The county must determine the necessity requiring the condemnation. Here, the Board of Commissioners determined repair of fish passage necessitated the condemnation. They made no other finding of necessity and the record reflects no other basis for such a finding. Thus this case is distinguishable from those situations where we may find an unarticulated but persuasive reason in the record to support a decision under review. The County's deputy prosecuting attorney has no authority to determine the necessity for a condemnation and therefore, acted without authority when articulating an additional purpose for replacing the culvert (i.e. protection from 100-year storm waters).

We hold that (1) the Salmon Recovery Act does not authorize counties to condemn private property, (2) repair and improvement of

salmonid fish runs is not a public use under RCW 8.08.010, and (3) a County attorney does not have authority under RCW 8.08.010 to articulate a different or additional purpose for condemnation not stated by the county's Board of Commissioners. Accordingly, we reverse the trial court's findings that "fish passage" and "protection for the county road from stream flows anticipated in connection with a 100-year storm events" are public uses. CP at 51.

We reverse.

Penoyar, J.

We concur:

Houghton, C.J.

Quinn-Brintnall, J.